(9)

No. 91-1200

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS

MARC D. MEZIBOV
Counsel of Record

MARTHA K. LANDESBERG
SIRKIN, PINALES, MEZIBOV & SCHWARTZ
920 Fourth & Race Tower
105 W. Fourth Street
Cincinnati, Ohio 45202
Telephone (513) 721-4876

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the City's ban on Discovery Center's and Harmon's newsracks fails to directly advance the particular safety and aesthetics-related interests which the City espouses, in violation of the first amendment, because it leaves unaddressed the problems of lack of uniformity in design and placement, and the potential for proliferation, posed by all newsracks collectively.

2. Whether the City's ban represents an unreasonable fit between the City's goals and the means chosen to effectuate those goals, in violation of the first amendment, because it imposes all of its regulatory burden upon Discovery Center's and Harmon's newsracks in exchange for *de minimis* benefits for the City's interest in addressing the safety and aesthetics-related problems posed by all newsracks collectively.

3. Whether, in the absence of evidence that newsracks have differential effects upon the City's safety and aesthetics-related interests depending upon the type of publication they contain, the City's ban on Discovery Center's and Harmon's newsracks creates an unconstitutional content-based distinction that cannot be justified by the City's interests in addressing the safety and aesthetics-related problems posed by newsracks collectively.

4. Whether the City's regulatory scheme is unconstitutional on its face, because it vests unbridled discretion in city officials to permit or to deny speakers access to the public right of way through newsracks or through other means.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner The City of Cincinnati, Ohio

Respondent Discovery Network, Inc.

Respondent Harmon Publishing Company, Inc.

The Respondents' statements pursuant to Rule 29.1 of the Rules of this Court are set forth in their Brief in Opposition to the Petition for Writ of Certiorari, at page 3 note 1.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

ADDITIONAL AUTHORITY:

TABLE OF AUTHORITIES – Continued

No. 91-1200

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, J. A. 37, is reported at 946 F.2d 464. The opinion of the United States District Court for the Southern District of Ohio, J. A. 25, is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 11, 1991. The Petition for a Writ of Certiorari was filed on January 9, 1992. This Court granted the Petition on March 9, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and is not disputed.

CONSTITUTIONAL PROVISIONS, STATUTES, AND MUNICIPAL ORDINANCES AND REGULATIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The texts of the following sections of the Cincinnati Municipal Code and City of Cincinnati Administrative Regulations are set forth in the Joint Appendix or in the Appendix to Petitioner's Brief:

Cincinnati Municipal Code

Section 714-1-C	Petitioner's Brief 1a
Section 714-1-N	Petitioner's Brief 1a
Section 714-23	Petitioner's Brief 2a
Section 862-1	Petitioner's Brief 2a
Section 911-17	Petitioner's Brief 3a

City of Cincinnati Administrative Regulations

Amended Regulation 38	J. A. 206
Administrative Regulation 67 (May 31, 1991)	J. A. 362
Administrative Regulation 67 (Revised, April 1, 1992)	J. A. 375

STATEMENT OF THE CASE

A. Procedural Posture

On June 1, 1990, Respondents Discovery Network, Inc. ("Discovery Center") and Harmon Publishing Company, Inc. ("Harmon") filed a complaint in the district court pursuant to 28 U.S.C. §1343 and 42 U.S.C. §1983,

challenging Petitioner The City of Cincinnati's ("City") regulatory scheme prohibiting the distribution of commercial handbills on the public right of way, both facially and as applied to their newspaper dispensing devices ("newsracks"). J. A. 3. Discovery Center and Harmon sought declaratory and injunctive relief, alleging that the City's scheme violated their first and fourteenth amendment rights of freedom of speech and equal protection of the laws, and their fourteenth amendment right to procedural due process. *Id.* at 8-9. Upon the City's agreement not to enforce its regulatory scheme pending a decision on the merits, the district court consolidated the hearing on Discovery Center and Harmon's motion for preliminary injunction with the hearing on the merits, pursuant to Fed. R. Civ. P. 65(a)(2). Following that hearing, the district court entered findings of fact and conclusions of law, holding, *inter alia*, that Discovery Center's and Harmon's publications were commercial speech and that the City's regulatory scheme violated Discovery Center's and Harmon's first amendment rights.[1] J. A. 25-34. The district court found that the "fit" between the City's goals of enhancing safety and enhancing the aesthetic appeal of the right of way, on the one hand, and the total ban on

[1] The district court ruled in the City's favor on the procedural due process claim but did not reach either the equal protection claim or the facial challenge to the City's regulatory scheme. Discovery Center and Harmon did not cross-appeal from the district court's judgment on the procedural due process claim or from its determination that their publications are commercial speech.

Discovery Center's and Harmon's newsracks, on the other, was "unreasonable," under this Court's decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). J. A. 32-33. The district court found that the ban was an "excessive" method of effectuating the City's goals. *Id.* at 32. The district court found that only sixty-two of the total fifteen hundred to two thousand newsracks on the public right of way were affected by the ban. *Id.* Since the number of newsracks prohibited was "minute" in comparison with the total number of newsracks the City was permitting to remain on the right of way, the district court found that the effect of the ban on the City's goals was "minimal." *Id.* The district court entered judgment on August 23, 1990. *Id.* at 35. The City filed a timely Notice of Appeal. *Id.* at 36. On October 30, 1990, the district court stayed execution of its judgment pending appeal.

On October 11, 1991, following briefing and oral argument, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the judgment of the district court and entering judgment accordingly. J. A. 37-58. Relying upon this Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and other decisions of this Court addressing the regulation of various kinds of commercial speech, the court of appeals reasoned that because Discovery Center's and Harmon's speech was neither false nor misleading, nor promoted activity the City could regulate as detrimental to its interests, it must be accorded "high value" in conducting the cost/benefit

analysis required by this Court in *Fox*. *Id*. at 52-53. The "high value" of Discovery Center's and Harmon's publications, both for their readers and for society as a whole, and the "very heavy" costs to Discovery Center and Harmon, and to society, resulting from the City's ban were not outweighed by the "paltry gains in safety and beauty" that the ban yielded. *Id*. at 53. Therefore, the court of appeals concluded, the City's ban failed to satisfy this Court's requirement in *Fox* that the fit between the substantial governmental interests sought to be furthered by a regulation burdening commercial speech and the means chosen to further those goals be "reasonable," in order to comport with the first amendment. *Id*. The court of appeals noted that the city's ban could not survive analysis as a reasonable time, place or manner regulation, because it "treat[ed] newsracks differently on the basis of the commercial content of the publications distributed." *Id*. at 54. As the City's own arguments were based upon its assertion that commercial speech is entitled to "lesser protection" than non-commercial speech, it was clear that the City's ban was not "*justified* without reference to the content of speech," and was, therefore, not content-neutral. *Id*. at 54-55 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). Finally, the court of appeals determined that the ban could not survive the "least restrictive means" analysis this Court has fashioned for determining the constitutionality of content-based regulations. *Id*. at 57-58. The City filed a timely Petition for a Writ of Certiorari in this Court, which granted the Petition on March 9, 1992.

B. Facts

Discovery Center is an Ohio corporation that promotes, for a fee, non-credit life-long learning programs, recreational opportunities and social events for individuals in the greater Cincinnati area. Verified Complaint, J. A. 4. Discovery Center promotes and publicizes its programs by distributing a free magazine that is published nine times per year. *Id*. at 5. Pl.Ex. 24; J. A. 125, 171. In February, 1989, the City issued Discovery Center a permit to distribute its magazine in newsracks located on City sidewalks. J. A. 6. The permit was issued pursuant to Amended Regulation 38, which, at all times relevant, governed the method of placement of newsracks containing "newspapers of general circulation" upon the public right of way with respect to vehicular and pedestrian traffic and ramps for the handicapped and regulated the manner in which newsracks advertised the publications they contain. Pl.Ex. 1; J. A. 206, 66, 171. Discovery Center purchased fifty newsracks, thirty-eight of which were placed in various locations in downtown Cincinnati, all in locations preapproved by the City. J. A. 131, 133-34. Approximately one-third of the Discovery Center magazines being distributed in the City of Cincinnati are distributed by means of these newsracks. *Id*. at 138.

Discovery Center's newsracks are free-standing metal dispensing machines approximately three feet high, three feet wide, and eighteen inches deep and comprise a dispensing box set upon either a pedestal or a four-legged stand. J. A. 5. At all times relevant, Discovery Center's newsracks were affixed to certain sites such as light poles by means of chains, as were numerous newsracks belonging to local and national newspapers. J. A.

134; Pl.Ex. 33B-D; J. A. 400-02, 83-85, 171. Discovery Center's newsracks were at all times relevant in compliance with the requirements of Amended Regulation 38. J. A. 6.

Harmon is a New Jersey corporation registered to do business in Ohio that publishes and distributes magazines advertising real estate in locations throughout the United States, including the greater Cincinnati area. Verified Complaint, J. A. 5. Harmon distributes a free publication, *Homes Magazine*, through free-standing, weighted plastic newsracks placed in twenty-four locations in the Cincinnati area. *Id.*; Pl.Ex. 25; J. A. 150, 171. In addition to its listings and photographs of residential real estate for sale and for rent in the Cincinnati area, *Homes Magazine* periodically contains articles about subjects such as trends in mortgage rates, financing options and the like. J. A. 154, 167. Approximately fifteen percent of the magazines Harmon distributes in the Cincinnati area are distributed through its newsracks. *Id.* at 168. On July 21, 1989, the City approved Harmon's request for a newsrack permit pursuant to Amended Regulation 38. Pl.Ex. 9; J. A. 222, 157, 171. As was true of Discovery Center's devices, at all times relevant Harmon's newsracks fully complied with Amended Regulation 38. J. A. 6.

On February 7, 1990, the City Council of the City of Cincinnati passed a motion requiring the City's Department of Public Works to enforce the City's existing ordinances governing the distribution of "commercial handbills" on the public right of way so as to bar from the right of way newsracks from which "commercial handbills" were distributed. Pl.Ex. 10; J. A. 236, 158, 171. Pl. Ex. 16; J. A. 238, 118, 171. Pl.Ex. 2; J. A. 229, 100, 171. The City Manager reported that, pursuant to Sections

714-23 and 714-1-C of the Cincinnati Municipal Code and Amended Regulation 38, he would henceforth instruct the Public Works Department to approve newsrack requests only for "publications primarily presenting coverage of, and commentary on, current events." Pl.Ex. 2; J. A. 230, 100, 171.

On March 8, 1990, the City sent identical letters to Discovery Center and Harmon, advising them that their respective publications had been deemed "commercial handbills" under Section 714-1-C and revoking their newsrack permits. Pl.Ex. 16; J. A. 238, 118, 171. Pl.Ex. 10; J. A. 236, 158, 171. Administrative hearings were held regarding the City's order revoking Discovery Center's and Harmon's newsrack permits on April 5, 1990, and April 26, 1990, respectively. Both Discovery Center's and Harmon's appeals were denied, and each was ordered to remove its newsracks from the City right of way. Pl.Ex. 17; J. A. 244, 171; R. 89. Pl.Ex. 12; J. A. 246, 159, 171. The instant litigation then ensued.

At the hearing in the district court, City Architect Robert Richardson testified that, although the City has since 1979 attempted to develop aesthetic standards governing structures upon the City's right of way, none has been enacted into law. J. A. 63, 67. The City had drafted and was intending to enforce a set of guidelines developed in cooperation with newspaper publishers which would regulate not only the placement of vending devices but also their design, imposing a degree of uniformity in size and appearance which the City Architect found desirable. *Id.* at 67-71, 75. The City had not included Discovery Center or Harmon in its negotiations concerning these guidelines, which, at the time of the

hearing, had been embodied in a proposed administrative regulation dated June 14, 1990. *Id.* at 70-71, 74. Pl.Ex. 3; J. A. 247, 68, 171.

The City Architect conceded that there was "nothing wrong with" Discovery Center's and Harmon's newsracks from an aesthetic point of view. J. A. 74. Furthermore, he was not aware of any safety problems caused either by Discovery Center's or Harmon's newsracks. *Id.* at 75. Indeed, the City Architect testified that were Discovery Center and Harmon to use the same newsracks as the newspapers, or any other device deemed appropriate by the City, he would have no aesthetic objection. *Id.* at 71, 75, 79-80. His concern was that if some publications deemed "commercial handbills" were allowed to have dispensing devices on the public right of way, others would follow and "the numbers could become a significant problem." *Id.* at 74. He also testified, however, that the same proliferation concerns would be implicated if additional numbers of publishers of publications not deemed "commercial handbills" sought to place dispensing devices on the public right of way. *Id.* at 75.

According to the City Architect, all newsracks, collectively, posed aesthetic problems due to their lack of uniformity in design. J. A. 78-79. The problem of rusting of City poles caused by the chains used to secure newsracks raised safety and aesthetic concerns implicating all newsracks on the right of way. *Id.* at 79-80. Similarly, the City Architect's concerns with respect to aesthetics, location and quantity related to all newsracks, regardless of the type of publication they contained. *Id.* at 84-85. If the quantity and size of newsracks were regulated in some

manner, the City Architect testified, those concerns would be satisfied. *Id.* at 86.

City Engineer Thomas Young, whose office is responsible for issuing newsrack permits, testified that Discovery Center's and Harmon's permits were the first to be requested by publications that were not newspapers. J. A. 117. Until the City determined to remove Discovery Center's and Harmon's newsracks from the right of way, there was no problem with those newsracks. *Id.* at 115. The City Engineer knew of no damage or injury claims attributed to Discovery Center's or Harmon's newsracks. *Id.* at 96. He was aware of only one complaint regarding either Discovery Center's or Harmon's newsracks, that from a merchant who objected to the placement of a Discovery Center newsrack near her store (a complaint which Discovery Center had readily addressed and remedied). *Id.* at 96-99, 134.

The City Engineer testified that the decision to revoke Discovery Center's and Harmon's newsrack permits was related to the general problem of "the proliferation of [the newsrack]." J. A. 116. Discovery Center's and Harmon's newsracks were not specifically ordered removed from the City right of way because they presented safety or aesthetics problems. *Id.* at 120-21. Indeed, the City Engineer had testified earlier that, if commercial publications such as Discovery Center's and Harmon's publications "were considered legal," there was no reason why the City's proposed regulation could not be applied to them. Young Deposition, J. A. 61, 171; R. 6. It was the general "issue of proliferation of [newsracks]" which was a potential safety issue. J. A. 121. This was so,

because there was "a finite amount of space where [newsracks could] be placed on the sidewalks, particularly in the Downtown area, but this applie[d] to other areas as well." *Id.* at 201. The City Engineer estimated that at the time of the hearing there were between fifteen hundred and two thousand newsracks on the City right of way. *Id.* at 123. Only four publishers – including Discovery Center and Harmon – had applied for newsrack permits from 1989 until the date of trial. *Id.* at 198-99. Indeed, only four publishers of "commercial" publications had applied for newsrack permits in the five years that Mr. Young had served as City Engineer. Young Deposition, J. A. 59, 171; R. 6.

Discovery Center's and Harmon's witnesses testified that there was no provision of the City's proposed regulation governing newsracks with which Discovery Center and Harmon would be unable or unwilling to comply. J. A. 138, 160. Gregory G. Goff, Harmon's Vice President and Director of Marketing, testified that Harmon would "willingly put out any type of box the City would specify." *Id.* at 162. Margaret Moertl, Director of Discovery Center, testified to the same effect. *Id.* at 137. Both Mr. Goff and Ms. Moertl testified that the distribution of their publications through newsracks had unique value to Discovery Center and to Harmon. Ms. Moertl testified that the use of newsracks was "the most effective means" Discovery Center had found to reach the particular audience of individuals, representing one third of its readers, who had grown to depend upon finding its publication in public places. *Id.* at 138-39. Mr. Goff testified that Harmon had historically distributed its publication inside banks.

Id. at 162. With the advent of the automatic teller, however, a significant readership (professionals working in the downtown Cincinnati area) was lost to Harmon, as those individuals no longer frequented those banks. *Id.* at 163. In Mr. Goff's view, Harmon's use of newsracks was necessary to reach that professional downtown Cincinnati readership. *Id.*

Since the evidentiary hearing in this case, the City has twice revised its newsrack regulation and enacted guidelines governing newsracks placed in the public right of way that largely reflect the City's negotiations with representatives of newspapers described by the City architect. J. A. 67-71, 75. On May 31, 1991, following oral argument in the court of appeals, the City Manager approved Administrative Regulation 67, which provided that "no more than five newsracks could be placed at any location," and further provided that

> [n]o more than two (2) newsracks in one location may contain commercial handbills as defined in Section 714-1-C of the Cincinnati Municipal Code unless there are vacant positions. The third and subsequent commercial handbill dispensing devices will be displaced when newspapers are granted permits for those positions.

J. A. 362, 366-67. Administrative Regulation 67 also subjects newsracks placed in the central business district to specific design and placement requirements, limits advertising on newsracks solely to the name and price of the publication dispensed, and requires that newsracks be bolted to sidewalks. J. A. 364, 367. Administrative Regulation 67 places no limits on the number of locations

where newsracks may be placed, and, therefore, places no cap on the total number of newsracks. On April 1, 1992, the City Manager approved revised Administrative Regulation 67, which currently governs newsracks on the public right of way. *Id.* at 375. The revised Regulation does not expressly provide for the placement of newsracks containing "commercial handbills" on the public right of way. It refers only to "newsracks" and is silent with respect to the type of publication contained within those newsracks. *Id.* In all other material respects, revised Administrative Regulation 67 is identical to its predecessor.

SUMMARY OF ARGUMENT

A. 1. The ban on the placement of newsracks containing commercial handbills in the public right of way does not "directly advance" the particular safety-and-aesthetics-related interests which the City espouses, within the meaning of *Central Hudson Gas & Electric Corp. v. New York Public Service Commission*, 447 U.S. 557 (1980). In fact, the City concedes that its sidewalks will remain "visually and physically cluttered" by newsracks despite the ban. Petitioner's Brief at 11, 18. The City is attempting to address the problems caused by the lack of uniformity in design, and the irregularity of placement and alignment, among all newsracks collectively, irrespective of the type of publication they contain. Newsracks *per se* are not the object of the City's actions to enhance the safety and aesthetics of the public right of way. The City seeks merely to impose uniformity in the design and placement

of newsracks, and not to prohibit their use on city sidewalks. Discovery Center's and Harmon's newsracks are indistinguishable from other newsracks, in terms of their asserted effect upon the safety and aesthetics of the public right of way. The City has presented no evidence that newsracks are inherently antithetical to the City's safety and aesthetics-related interests.

Regardless of the subject matter of the publications they contain, newsracks are amenable to regulations prescribing their design, size, and alignment with respect to one another. That this is so is demonstrated by the newsrack guidelines promulgated by the City following its cooperative efforts solely with local newspapers, which set forth precisely such design and placement limitations. This case is, therefore, distinguishable from *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), a case which expressly concerns the unique safety and aesthetics problems associated with the non-communicative aspects of billboards. In *Metromedia*, this Court found that billboards threatened San Diego's interests regardless of their location or design. A total ban on off-site billboards, therefore, directly advanced San Diego's interests. In the absence of similar evidence regarding newsracks, the City cannot establish that the ban directly advances its interests in addressing the lack of uniformity in design and placement of newsracks. This Court's reasoning with respect to the "law of billboards" in *Metromedia*, 553 U.S. at 501, does not control this newsrack case.

2. The City's ban does not directly advance the putative problem of the proliferation of newsracks on the City right of way. Newsracks containing commercial publications are indistinguishable from newsracks containing non-commercial publications, in terms of their impact on that problem. There is no evidence that the City intends to reduce or even limit the total number of newsracks it will allow to remain on the public right of way, provided they contain "non-commercial" publications. Neither Amended Regulation 38, in effect at the time of the evidentiary hearing, nor Administrative Regulation 67, which currently governs newsracks on the public right of way, sets limits on the total number of newsracks permitted. Unlike the ordinance at issue in *Metromedia*, which wholly eliminated off-site billboards as a medium of commercial expression, the City's ban does nothing to limit the presence of the asserted "problem," i.e., the newsrack. Since so many newsracks affecting the City's interests remain on the public right of way despite the ban, the ban can have only an inconsequential benefit for the City's interests and, therefore, cannot directly advance those interests. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811-12 (1984); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

B. 1. The City's ban fails to satisfy the *Central Hudson* requirement that it regulate commercial speech in a manner that is no more extensive than is necessary to serve the City's interests. The City has failed to "carefully calculate" the cost of its ban both to Discovery Center

and Harmon and to the public interest, as required by *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). The speech contained in Discovery Center's and Harmon's publications is neither false nor misleading; it concerns fully protected activity. *Harmon Homes* advertises the availability for sale or rent of residential real estate, information which this Court has deemed worthy of first amendment protection because it "bears on one of the most important decisions [individuals] have a right to make: where to live and raise their families." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977). Harmon Homes periodically contains articles about financing strategies, mortgage rates, and the like, educational information having an importance beyond the "mere" proposal of a commercial transaction. Discovery Center's magazine provides information about learning opportunities that is undeniably important both to individuals and to the public as a whole. This is not to suggest that the commercial component of Discovery Center's and Harmon's speech is not itself worthy of protection. Commercial speech which is neither false nor misleading, and which promotes activity that is not at odds with any governmental interest, plays a critical role in the marketplace of ideas. *Virginia Pharmacy Board*, 425 U.S. at 763. As the public and individual value of Discovery Center's and Harmon's speech is high, the costs of the City's ban are inordinately heavy. The ban totally denies Discovery Center and Harmon access to the means of distributing thirty-three and fifteen percent, respectively, of their publications in the Cincinnati area. The ban precludes Discovery Center and Harmon from placing their newsracks in public places, and therefore

deprives them of a uniquely effective medium of communication. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762 (1988). The public costs of the ban are equally onerous, because the ban restricts public access to valuable information about real estate and educational opportunities, unless such information appears in publications permitted by the City to be distributed by means of newsracks.

2. In contrast to the heavy costs it imposes upon commercial speech, the ban affords *de minimis* benefits for the City's interests in addressing the safety and aesthetic problems posed by the lack of design and placement uniformity among newsracks collectively. This is so, largely for the factual reasons that the ban fails to "directly advance" the City's interests, within the meaning of *Central Hudson*. The ban affects only sixty-two of a total of between fifteen hundred and two thousand newsracks currently on City sidewalks. The effect a particular newsrack has on the safety or aesthetics of the public right of way in Cincinnati bears no relation to whether it contains "commercial speech" or "non-commercial speech." Therefore, the City has failed to demonstrate that its ban, which draws distinctions among newsracks based upon the character of the publications contained *inside* them, is narrowly tailored to achieve its goal of addressing the characteristics of newsracks that it asserts are detrimental to its interests. *Fox*, 492 U.S. at 480. There are means of addressing the design and placement problems of all newsracks that are far less restrictive of commercial speech, and that attack those problems far more precisely, than the City's ban solely on newsracks containing commercial speech. This is not mere speculation, for the City has in fact adopted design and placement

limitations for newsracks, albeit only for newsracks containing "non-commercial" publications. The City's ban leaves unaddressed the problems the City has identified and does so at an "inordinate" cost to commercial speech, in violation of the first amendment. *Id.*

C. The City's ban is not a content-neutral means of regulating the time, place, or manner of dissemination of speech. The ban is not directed solely at the problems caused by newsracks collectively. The City is enforcing an unambiguously content-based ordinance, which bans only "commercial" handbills from the public right of way. The City's sole justification for its ban has been its ability to draw a content-based distinction between commercial and non-commercial speech, due to the "lesser protection" accorded the former. This distinction, however, is irrelevant to the interests intended to be served by the ban. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. ___, 112 S. Ct. 501, 510-11 (1991). Moreover, the City has involved publishers of newspapers, but not the publishers of "commercial" publications such as Discovery Center and Harmon, in its ongoing development of newsrack design and placement requirements. The regulatory scheme governing newsracks is in part the result of a partnership between local newspapers and the City. By forcing commercial speakers to buy space in newspapers in order to have access to the public right of way, the ban imposes a financial burden on them because of the content of their speech, and is therefore presumptively unconstitutional. *Simon & Schuster*, 502 U.S. ___, 112 S. Ct. at 508. Moreover, the ban is not content-neutral under the "secondary effects" doctrine of *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), because

there is no evidence that newsracks containing commercial speech have peculiar secondary effects on the safety and aesthetics of the right of way which distinguish them from other newsracks. As a content-based regulation, the City's ban is unconstitutional because it is not narrowly drawn to address the City's concern about the lack of uniformity among newsracks. *See Burson v. Freeman*, ___ U.S. ___, No. 90-1056 (May 26, 1992); *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

D. The City's regulatory scheme is unconstitutional on its face, because it places unbridled discretion in the hands of City officials to determine whether or not a publication is a "commercial handbill" and, therefore, unbridled discretion to permit or deny expressive activity on the public right of way. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The City's regulatory scheme suffers from several layers of constitutional infirmity. Section 714-23 of the Cincinnati Municipal Code is presumptively unconstitutional under *Virginia Pharmacy Board*, because it totally bans commercial speech but permits non-commercial speech on the public right of way. The Cincinnati Municipal Code defines "commercial handbill" in a manner which obliterates any distinction between "newspapers" which are permitted on the right of way as "non-commercial handbills," and "commercial handbills," which are not. The City's scheme provides no express guidelines or standards by which the categories of "commercial handbill" and "non-commercial handbill" may be distinguished. For example, a "newspaper," as that term is commonly understood, fits the City's definition of "commercial handbill." Thus, the City's scheme poses a substantial threat of content-based censorship,

whether among publications commonly thought of as "newspapers," or among publications such as Discovery Center's and Harmon's, which contain truthful commercial information about fully protected activity, or among publications falling into either category. Moreover, the City's regulation of newsracks is intimately tied to its overall scheme governing the dissemination of all speech on the public right of way in any manner, and, therefore, poses a greater threat to speech than the newsrack ordinance struck down in *Lakewood*, 486 U.S. at 778 (White, J., dissenting). The threat of content-based censorship in this case is palpable, given the City's active involvement exclusively with newspapers in drafting it newsrack regulations. Finally, although a facially invalid regulatory scheme may be saved where the government adopts a narrowing construction which provides guidance to decisionmakers charged with its enforcement, *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989), the City has not done so in this case.

ARGUMENT

I. The City's Ban On Discovery Center's And Harmon's Newsracks Fails To Directly Advance The City's Interest In Addressing the Lack of Uniformity In The Design, Placement, and Alignment of Newsracks On The Public Right Of Way.

It is undisputed that Discovery Center's and Harmon's speech concerns lawful activity and is neither false nor misleading. It is also undisputed that the City's interests in maintaining the safety and aesthetic appeal of the

public right of way are substantial, in the abstract. Therefore, the relevant inquiry in this case must begin with a determination of whether the City's ban on Discovery Center's and Harmon's newsracks "directly advances" the City's safety and aesthetic interests. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). The resolution of this issue requires a factual inquiry into the connection between the government's asserted interests and the method of regulating commercial speech chosen to address those interests. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 462, 475-76 (1989). Where that connection is "tenuous," "remote" or "ineffective," this Court has held that the interests asserted cannot support a ban on commercial speech. *Central Hudson*, 447 U.S. at 564, 569 (argument that prohibition on advertising promoting power usage furthers state goals of protecting equity and efficiency of utility rate structure held "highly speculative"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 378 (1977) (disciplinary rule prohibiting advertisement of prices of legal services held an "ineffective" means of addressing state's substantial interest in safeguarding the quality of attorneys' work); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95-96 (1977) (no support in record for city's assumption that prohibiting "For Sale" signs will advance city's goal of decreasing concern over home sales and thereby promote racially integrated housing, where evidence fails to establish substantial incidence of panic selling or that "For Sale" signs are a "major cause" of panic selling); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976) (ban on drug price advertising "does not directly affect

[state's substantial interest in protection of pharmacists'] professional standards one way or the other"). *Cf. Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341-42 (1986) (given "immediate connection" between advertising of casino gambling and increased demand for casino gambling, ban on such advertising directly advances legislative goal of combatting ill effects of casino gambling) (citing *Central Hudson*, 447 U.S. at 569). The ban on Discovery Center's and Harmon's newsracks must be measured against this Court's admonition that "[a] regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564.

The City Architect and the City Engineer testified that newsracks, *regardless of their content*, "detract from" the safety and aesthetic appeal of the public right of way. J. A. 181, 183, 193. There is, however, no evidence in the record that newsracks *necessarily* undercut the City's interests. The City Engineer testified that newsracks *"can"* affect public safety *"if* they are improperly positioned," as would be the case if they obstructed sidewalks or ramps for the disabled, or if they were too numerous at a particular location. *Id.* at 193-94 (emphasis added). The City Architect stated that his concern was not that any newsrack was "in itself" offensive to the City's aesthetic interests. *Id.* at 187. It was the lack of uniformity among newsracks generally, in terms of their placement and alignment on the public right of way and their design, which posed the aesthetic problem. *Id.*; J. A. 78-80, 84-86. That newsracks, *qua* newsracks, were not the object of the City's actions to enhance the safety and aesthetics of the

public right of way is clear from the City Architect's own statement that the City does not intend to do away with newsracks, but rather "want[s] to *organize* them like the other elements on the street." *Id.* at 189 (emphasis added).

Furthermore, there is scant evidence in the record that Discovery Center's or Harmon's newsracks, *in particular*, compromise the City's interests in aesthetics or public safety in any manner at all, let alone in a manner peculiar to them. As the City Engineer stated, Discovery Center's and Harmon's newsracks were not ordered removed from the public right of way because they posed any particular aesthetic or safety problem. J. A. 120-121. Indeed, the City could not have argued that the design or placement of Discovery Center's or Harmon's newsracks violated Amended Regulation 38, for that Regulation contained no design requirement at all, nor did it prohibit the attachment of newsracks to City poles by means of chains. *Id.* at 206. The testimony demonstrates that both Discovery Center and Harmon could comply with any design or placement requirements the City might devise. *Id.* at 137-38, 160, 162. This is supported by the City Engineer's testimony that there was no reason that the City's proposed newsrack regulation could not be applied equally to Discovery Center's and Harmon's boxes, were they "considered legal." *Id.* at 61.

This case is, therefore, distinguishable from *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), upon which the City relies so heavily. It is critical to examine why this Court determined that the ordinance before it in *Metromedia*, which completely prohibited off-site billboards displaying commercial speech, "directly advanced" San Diego's interests in safety and aesthetics, as required by

Central Hudson. In *Metromedia*, the California Supreme Court had held that because billboards were designed to distract a driver's attention from the road, and in fact do so distract, an ordinance eliminating those billboards reasonably relates to traffic safety. 453 U.S. at 508-09 (citing 26 Cal 3d. at 859, 610 P.2d at 412). This was so, even though there was controversy as to whether the distractions of billboards in fact caused traffic accidents. *Id.* As the legislative judgment was not unreasonable, this Court found that San Diego's safety concerns were directly advanced by the ban. *Id.* at 509. This Court looked to the inherent characteristics of billboards in deciding that the ban directly advanced the City's aesthetics concerns. "It is not speculative," this Court stated, "to recognize that billboards *by their very nature, wherever located and however constructed*, can be perceived as an 'esthetic harm.' " *Id.* at 510 (emphasis added).

Metromedia is securely grounded in its facts, as it *expressly* deals with the unique problems associated with the noncommunicative aspects of billboards. As this Court stated, "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. *We deal here with the law of billboards.*" *Id.* at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)) (emphasis added). In contrast to *Metromedia*, the instant case involves the dissemination of commercial speech through newsracks. Unlike billboards, as the evidence in *Metromedia* describes them, the newsracks in the instant case are not "intended," *Metromedia*, 453 U.S. at 508, to create a distraction for drivers or pedestrians and thus do not inherently create safety problems, "wherever located." *Id.* at

510. Moreover, there is no evidence that, in contrast to billboards, the newsracks in the instant case are aesthetically harmful "however constructed." *Id.* The record is devoid of any evidence supporting the proposition that Discovery Center's and Harmon's (or anyone else's) newsracks are not amenable to regulation less onerous (and more precise) than an outright ban in the interest of enhancing the aesthetics and safety of the city right of way. The newsracks on the city right of way are amenable to design, placement and alignment requirements that will minimize, if not eliminate, the aesthetic or safety problems postulated by the City. The best evidence that newsracks, unlike billboards, are neither inherently nor irremediably unattractive or threatening to public safety or aesthetics is the City's express intent to permit thousands of newsracks on the public right of way, subject to design and placement specifications of the City's own choosing. Without evidence demonstrating that newsracks, by their very nature and regardless of their design, offend the City's public safety and aesthetics concerns, the City has not met its burden, *Fox*, 492 U.S. at 480, of establishing that its ban "directly advances" its asserted interests. This Court's reasoning with respect to billboards in *Metromedia* does not control this newsrack case.

II. The City's Ban On Discovery Center's And Harmon's Newsracks Fails To Directly Advance The City's Interest In The Potential For The Proliferation Of Newsracks On The Public Right Of Way.

The City Architect testified that even if Discovery Center and Harmon were to use newsracks identical to those used by "non-commercial" publications, permitting their newsracks to remain on the public right of way

would raise concerns about proliferation of newsracks. J. A. 74. The City Engineer conceded that it was the general problem of "the proliferation of the [newsrack]" which caused the City to order Discovery Center and Harmon to remove their newsracks from the public right of way. *Id.* at 116. "Proliferation [of newsracks]," the City Engineer stated, "can be a safety issue and is a safety issue in some areas." *Id.* at 121. The City has apparently abandoned any proliferation-related rationale for its ban on newsracks containing commercial speech; proliferation is nowhere mentioned as a discrete concern in the City's Brief. Whatever the City's position with respect to proliferation may be, the ban does not "directly advance" an interest in the proliferation of newsracks, within the meaning of *Central Hudson*.

First, although the City Architect expressed a concern with proliferation, he conceded that concern was implicated not only by the presence of newsracks containing "commercial publications" but also by the potential that "non-commercial" publishers not yet on the public right of way would seek to distribute their publications through newsracks. J. A. 75. The City's ban does nothing to address the potential proliferation of non-commercial publishers seeking newsrack permits. Moreover, since there is no evidence of differential proliferation effects among newsracks, based upon the publications they contain, the City's proliferation concern does not justify disparate treatment of newsracks containing commercial speech. Second, there is scant evidence supporting the City Architect's hypothetical concern with proliferation in the first instance. The City Engineer testified that only four "commercial" publications, including Discovery

Center and Harmon, had sought newsrack permits during the five years preceding the time of trial. *Id.* at 59-60, 198-99. Most important, there is not an iota of evidence in the record that the City intends to place a limit on the total number of newsracks (or newsrack locations) that it will permit to remain on the public right of way, even though, as the City Engineer testified, "there is a finite amount of space where [newsracks could] be placed on the sidewalks, particularly in the Downtown area." *Id.* at 201. Amended Regulation 38 sets no upper limit on the number of newsracks. *Id.* at 206. Administrative Regulation 67, both in its May 31, 1991 and April 2, 1992 versions, limits the number of newsracks at any one location to five, but sets no limit on the number of locations. *Id.* at 362, 375. The City itself argues that, given the finite amount of space, requiring it to treat newsracks equally regardless of the character of the publications they contain would force it to deny space to "noncommercial publications." Petitioner's Brief at 28. Setting aside, for the moment, the question whether the City may draw this content-based distinction in the first instance, the ban on Discovery Center's and Harmon's newsracks utterly fails to "directly advance" any asserted interest in proliferation. There is no evidence that the total number of newsracks on the public right of way will decrease, as a result of the ban. The ban is an "ineffective" means of addressing the City's proliferation concerns and, therefore, fails to satisfy the *Central Hudson* test.

The City asserts that it has no argument with the content of Discovery Center's and Harmon's publications and that it is simply attempting to remedy the aesthetic and safety problems it claims are caused by newsracks. Petitioner's Brief at 31. Even if this were the case (and, as

discussed below, the evidence indicates the City's decided preference for newspapers over "commercial" publications), the fact that the City is content to permit thousands of newsracks to remain upon the public right of way is fatal to this argument. Whether proliferation is viewed as a discrete rationale for the City's ban or as an issue subsumed within the City's interests in the aesthetics and safety of the public right of way, the City's ban is an "ineffective," *Central Hudson*, 447 U.S. at 564, means of advancing those interests. Assuming, *arguendo*, that the presence of newsracks, regardless of their content, cannot be reconciled with the City's interests by prescribing uniformity of design, placement, or alignment, thousands of offending newsracks will be permitted to remain on the public right of way. The City essentially concedes the inefficacy of the ban in advancing its aesthetic and safety concerns, for it states that "sidewalks will remain visually and physically cluttered by newsrack-type dispensers dispensing noncommercial forms of speech such as newspapers," despite the ban. Petitioner's Brief at 11. Whereas, in *Metromedia*, the City of San Diego's proposed ban on all off-site billboards would have, as the parties stipulated, "eliminate[d] the outdoor advertising business in the City of San Diego," 490 U.S. at 497, the City's ban in the instant case does nothing to limit or reduce the asserted aesthetic and safety "problem," i.e., the newsrack. The City's ban, therefore, does not affect the asserted source of the City's problems one way or the other, and fails, on any theory, to directly advance the City's interests. *Virginia Pharmacy Board*, 425 U.S. at 769. In short, since so many newsracks adversely affecting the City's interests in safety and aesthetics will remain on the public right of way despite the

ban, the ban can have only an inconsequential benefit for the City's interests and, therefore, cannot "directly advance" those interests. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811-12 (1984) (*dicta*) (upholding content-neutral ban on temporary signs posed on public property as applied to political campaign signs). The requisite factual predicate for a determination that the City's ban directly advances the City's goals, *see id.*, is simply not present in this case.

III. The "Fit" Between The City's Ban On Discovery Center's And Harmon's Newsracks And The City's Stated Goals Of Protecting The Safety And Aesthetics Of The Public Right Of Way Is Not "Reasonable," Within The Meaning of *Board Of Trustees Of The State University Of New York v. Fox*.

Central Hudson requires both that a regulation burdening commercial speech "directly advance" the government's substantial interests and that the regulation be "no more extensive than is necessary to serve [those interests]." 447 U.S. at 566. This Court has explained that both the third and the fourth steps in the *Central Hudson* analysis involve evaluation of the "fit" between the government's ends and the means it chooses to effectuate those ends. *Posadas*, 478 U.S. at 341. Logically, the City's ban fails to satisfy the fourth step of the *Central Hudson* analysis for the factual reasons that it fails to "directly advance" the City's interests. As more fully discussed in Part I, *supra*, the problem the City is trying to address is the lack of design uniformity, as well as the irregularity and security of placement, of newsracks, *collectively*. The facts of this case simply permit no other conclusion than

that the City's ban is an excessive means of addressing that problem.

A. *Central Hudson* and *Fox* require balancing of government interests against speech interests in determining the constitutionality of regulations burdening commercial speech.

The City argues that, in weighing the benefits of the City's ban for its stated goals against the burden the ban imposes upon Discovery Center's and Harmon's speech, the court of appeals embarked upon an unprecedented mode of analysis. Petitioner's Brief at 18-23. Indeed, the City maintains that "*Central Hudson* requires no 'balancing test' of speech burdened against interest served." *Id.* at 22. This assertion is without merit, as it ignores the totality of this Court's commercial speech jurisprudence. In commercial speech cases preceding *Central Hudson*, this Court required the very balancing that the City considers irrelevant. The centrality of this interest balancing was clear as early as this Court's statement in *Linmark Associates* that "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation" burdening speech, whether labeled as "commercial" or otherwise. 431 U.S. at 91 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)). The interest balancing that the City seeks to avoid is also obvious in this Court's consideration in *Virginia Pharmacy Board* of both the informational value of commercial advertising of drug prices and the strength of the government interests underlying the ban on such advertising. 425 U.S. at 762-770. It is equally obvious in the Court's analysis of the ban on advertisement of prices for legal services at issue in *Bates*. 433 U.S.

at 368-379. *Central Hudson* itself involves such interest balancing, 447 U.S at 563-571.

This Court's refinement of the fourth part of the *Central Hudson* test in *Fox* permits no conclusion other than that a court must balance the interests involved, in determining whether a challenged regulation burdens commercial speech "no more broad[ly] or no more expansive[ly] than 'necessary' to serve [the government's] substantial interests." *Fox*, 492 U.S. at 476 (citations omitted). As this Court has interpreted it, the fourth *Central Hudson* criterion requires that the means/ends fit embodied by the regulation be "reasonable," and that the government "carefully calculate" the costs imposed by its regulation, in light of the "substantial" goals it is intended to further. *Fox*, 492 U.S. 480. In *Fox*, this Court eschewed both the "least restrictive means" test required by the court of appeals in that case and the "rational basis" test applicable to regulations challenged on fourteenth amendment equal protection grounds. *Id.* This Court distinguished its "reasonable fit" requirement from "rational basis" analysis, in which the inquiry is simply whether a regulation furthers a "legitimate" government purpose, "without reference to whether it does so at inordinate cost." *Id.* The question before this Court, therefore, is not, as the City would have it, whether the court of appeals *should have* analyzed the benefits of the City's ban in light of the commercial speech interests at stake, but rather whether the court of appeals *struck the proper balance* among the conflicting interests in concluding that the City had failed to meet its burden, *Fox*, 492 U.S. at 480, of affirmatively establishing that the "fit" between the ban and its stated interests in regulating the safety and aesthetic problems assertedly posed by newsracks on the public right of way

is "reasonable." This Court must answer that question in the affirmative.

B. The ban imposes heavy costs upon Discovery Center's and Harmon's speech and on the public's interest in receiving truthful commercial information that promotes fully protected activity.

From the outset of this case, the City has been guided by the assumption that Discovery Center's and Harmon's publications are not protected by the first amendment, and that its power to regulate is boundless, even though the speech at issue is not false or misleading and even though Discovery Center and Harmon promote activity that is not at odds with any governmental interest. The court of appeals rejected this assumption, and properly took into account the value that this Court has accorded speech such as Discovery Center's and Harmon's. J. A. 52. This Court has repeatedly recognized the value of truthful commercial speech that fosters lawful activity. As this Court stated in *Virginia Pharmacy Board*, the fact that an advertiser's interest in speaking is "purely economic . . . hardly disqualifies him from protection under the First Amendment." 425 U.S. at 762. Even more important for the instant case is this Court's recognition, beginning in *Virginia Pharmacy Board*, that commercial speech plays a critical role in the marketplace of ideas. "[T]he particular consumer's interest in the free flow of economic information . . . ," this Court stated, "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

The value of commercial speech is not limited to the value it has for individuals, however. As this Court stated in *Bates*:

> [S]ignificant societal interests are served by [commercial] speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day . . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system . . . . In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.

Bates, 433 U.S. at 364 (citations omitted). *Accord Linmark Associates*, 431 U.S. at 92. The information communicated by Discovery Center's and Harmon's particular publications is valuable for these very reasons. *Harmon Homes* advertises the availability for sale or rent of real estate, in particular residential real estate. J. A. 5, 151-52. This Court has said, with reference to "For Sale" signs on residential property, that information about the availability of such property is valuable and worthy of first amendment protection because it "bears on one of the most important decisions [individuals] have a right to make: where to live and raise their families." *Linmark Associates*, 431 U.S. at 96. *Harmon Homes* also provides, albeit on an irregular basis, articles about financing strategies, mortgage rates, and the like, and so periodically contains information beyond that "merely" proposing a commercial transaction. J. A. 154, 167. Discovery Center's magazine provides information about learning opportunities, *id.* at 126, the importance of which from both an

individual and societal standpoint cannot be gainsaid. Discovery Center and Harmon promote conduct that in no way implicates a governmental need to protect its citizenry, and the City has not contended as much. The content of Discovery Center's and Harmon's speech affects no City interest adversely, and the City's dismissive valuation of these publications is unwarranted. This case is, therefore, very different from a case such as *Posadas*, in which this Court held that the Puerto Rico legislature's concern with the deleterious effects of casino gambling on the health, safety and welfare of its citizens, coupled with the legislature's power to completely ban casino gambling, justified a total ban on advertisements of casino gambling directed at residents of Puerto Rico. 478 U.S. at 340-41, 345-46.

C. The ban has *de minimis* benefits for the city's interests.

The City argues that the court of appeals "improperly" analyzed the ban on Discovery Center's and Harmon's newsracks under the fourth part of the *Central Hudson* test. Petitioner's Brief at 18-28. This argument is without merit. As this Court required in *Fox*, the court of appeals took into account the costs of the ban to Discovery Center and Harmon, and measured those costs against the benefits the ban would have for the City's interests in public safety and aesthetics. J. A. 52-54. The court of appeals found, as had the district court, that the ban on Discovery Center's and Harmon's newsracks, which comprised sixty-two out of a total of between fifteen hundred and two thousand newsracks currently on City sidewalks, would have a "minuscule" effect on

the City's concerns for safety and aesthetics. *Id.* at 53. In contrast, the court of appeals correctly recognized that if the ban were held constitutional, the cost to Discovery Center and Harmon would be a heavy one: the total loss of the means of distributing thirty-three percent of Discovery Center's publications and fifteen percent of Harmon's publications in the Cincinnati area. *Id.* at 53. The City cannot minimize the impact of the ban simply by referring to the percentages of their publications that Discovery Center and Harmon remain able to distribute in the Cincinnati area despite the ban. Petitioner's Brief at 38. Both Discovery Center's and Harmon's employees testified that newsracks are uniquely important in reaching a particular targeted readership. J. A. 138-39, 162-63. This Court has recognized the particular effectiveness of newsracks as a means of communication. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762 (1988). The court of appeals also assessed the costs of the City's ban in terms of the loss to the public the ban would cause, i.e., the loss of information this Court has recognized as valuable and protected. In determining that the fit between the ban and the City's aesthetics and safety-related goals was unreasonable under *Fox*, the court of appeals recognized that "commercial speech has public and private benefits apart from [those to be derived from not imposing an undue burden on Respondents' particular commercial speech]." *Id.* at 53. As discussed above, that assessment is not without precedent in this Court.

The City asserts variously that "the degree to which [its goals are] furthered in a particular case is irrelevant" to the fourth part of the *Central Hudson* analysis and that "there is no requirement under *Central Hudson* that [its interests] be furthered a particular degree or a certain

amount." Petitioner's Brief at 10, 20. Therefore, the City contends, the court of appeals erred in holding the City's ban unconstitutional because the benefits of the ban for the City's goals are "paltry." *Id.* at 20. In so arguing, the City disregards the requirement in *Fox* that the means chosen by the government to regulate commercial speech be "narrowly tailored *to achieve the desired objective*. 492 U.S. at 480 (emphasis added). The City has failed entirely to justify its ban on Discovery Center's and Harmon's sixty-two newsracks on grounds that the ban achieves, even to a minimal extent, its goals of correcting the aesthetic and safety-related problems the City's own witnesses testified are posed by newsracks collectively, due to their lack of uniformity in design and placement on the public right of way. As previously discussed, the City remains content to allow the vast majority of newsracks to remain on the public right of way, subject to certain design, placement, and alignment restrictions. Therefore, the City cannot demonstrate that the distinction which it has drawn among newsracks, a distinction that bans or fails to ban newsracks based upon the character of the publications contained *inside* them, is narrowly tailored to achieve its goal of addressing the characteristics of newsracks that it asserts are detrimental to its interests. As the record in this case clearly demonstrates, the effect a particular newsrack has on the safety and/or aesthetics of the public right of way in Cincinnati bears no relation to whether it contains within it "commercial speech" or "non-commercial speech."

Thus, the total ban only upon Discovery Center's and Harmon's newsracks has *de minimis* benefits for the City's interest in addressing this problem. Furthermore, the City's ban can have no effect upon the City's goal of

addressing the potential proliferation of newsracks, because the City has placed no cap upon the number of newsracks it will permit on the public right of way (as long as those newsracks contain "non-commercial" speech), despite the "finite" amount of space available for the placement of newsracks. J. A. 201. Although the City now argues that it "must," "as a practical matter," put a cap on the total number of newsracks on the public right of way, Petitioner's Brief at 26 n.8, the fact remains that there is no evidence in the record that it has or intends to do so.

In contrast to the inconsequential benefits the City's selective ban on newsracks containing commercial speech can have for the City's goals, the costs of the ban are heavy, as explained above. It bears repeating that *Fox* requires more than that the City's ban satisfy a "rational basis" analysis, which requires deference to the legislative judgment whether or not the particular regulatory means chosen exacts an "inordinate" burden upon the speech regulated, so long as the regulation serves legitimate governmental goals. 492 U.S. at 480. In enacting the ban the City has failed utterly to take into account, let alone "carefully calculate," *id.*, those costs. The price the City has exacted, despite the dearth of benefit to the City in addressing design and safety problems posed by all newsracks, is the complete denial of access by Discovery Center and Harmon to the public right of way and denial of the public's concomitant right of access to these publications. Contrary to the City's assertion, this Court is not required to automatically defer to the City's judgment that its interests "can best be furthered" by the ban on Discovery Center's and Harmon's newsracks. Petitioner's Brief at 25-26. *Fox* requires a level of factual proof that the

evidence in this case cannot meet. It is simply *irrational* to attempt to cure problems associated with the non-communicative aspects of all newsracks by (a) banning only newsracks containing commercial speech and (b) failing to limit the total number of newsracks containing non-commercial speech. The court of appeals properly balanced the competing interests involved in this case in holding that the ban is unconstitutional under *Central Hudson* and *Fox*.

The City suggests that the court of appeals applied a "least restrictive means" test in analyzing whether the City's ban is "no more extensive than necessary" to serve the City's interest in addressing the aesthetics and public safety problems it asserts are caused by newsracks. Petitioner's Brief at 15. This is simply not the case. A "least restrictive means" requirement holds government regulators to one and only one method of regulation. In contrast, the court of appeals found that many other, more precise modes of regulating newsracks remain open to the City. In so holding, the court of appeals was not substituting its judgment for the City's as to which mode to choose. J. A. 54. The fact that such alternative regulatory modes were being contemplated by the City at the time of trial (albeit with respect only to newsracks containing newspapers) and have in fact been implemented for newsracks containing newspapers demonstrates that the ban is substantially broader than necessary to effectuate the City's goals. Since, as was true in this Court's decisions striking down regulations under *Central Hudson*, "far less restrictive and more precise means," *Fox*, 492 U.S. at 479 (citations omitted), exist for addressing the City's concerns with the uniformity of design and placement of newsracks, the City's ban on newsracks

containing commercial speech cannot survive the scrutiny required by this Court in *Fox*.

IV. The City's Ban Is A Content-Based Regulation That Is Not Narrowly Drawn To Address The Safety And Aesthetics-Related Problems Flowing From The Lack Of Uniformity In The Design, Placement And Alignment, And Potential Proliferation, Of Newsracks On The Public Right Of Way.

A. The ban is directed solely at commercial speech that is not disseminated in newspapers.

Commercial speech, like other categories of speech, is properly the subject of reasonable restrictions upon the time, place or manner in which it is disseminated, provided such restrictions are content-neutral. *Bates*, 433 U.S. at 384; *Virginia Pharmacy Board*, 425 U.S. at 771. The City contends, for the first time in this litigation, that its ban on newsracks containing commercial publications is content-neutral, because it "is directed solely at the esthetic and safety problems caused by newsrack-type dispensers and not at any viewpoint that the city finds objectionable . . . . " Petitioner's Brief at 31. Since the ban is "*justified* without reference to the content of the regulated speech," the City argues, it is consistent with the first amendment, even though it has "incidental effect[s]" solely upon commercial speech. *Id.* at 30 (citing *Renton v. Playtime Theatres*, 475 U.S. 41, 47-48 (1986) and *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This argument does not square with the City's prior arguments in this case. The City's sole justification for its ban, both in the district court and on appeal, has been its ability to draw a content-based distinction between commercial and non-commercial

speech, due to the "lesser protection" accorded the former. *See e.g.*, Argument on Motion for Directed Verdict, J. A. 174-75. This distinction, however, is irrelevant to the interests intended to be served by the ban. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. ___, 112 S.Ct. 501, 510-11 (1991). Moreover, the City has applied Amended Regulation 38 to enforce Section 714.23 of the Cincinnati Municipal Code, which unambiguously bans only *commercial* handbills from the public right of way. *Cf. Taxpayers for Vincent*, 466 U.S. at 804 ("[T]he text of the ordinance is neutral – indeed it is silent – concerning any speaker's point of view . . . ").

That the City's ban is content-based is also evidenced by the fact that the City has involved publishers of newspapers, but not "commercial" publishers such as Discovery Center and Harmon, in its ongoing development of newsrack design and placement requirements. J. A. 60, 70-71, 190-92. As the City Engineer stated, "newspapers, including their advertising content, have a special status that is essentially [inviolate]." *Id.* at 203. The City Architect's testimony is most damaging to the City's belated contention that its ban is directed *solely* to public safety and aesthetics. When asked whether it was fair to say that the City's regulatory scheme was in part a partnership with the newspapers of the City, the City Architect said, "Yes, sir. Definitely." *Id.* at 191. The result of this partnership is clear: the City's ban subsidizes publishers of commercial speech favored by the City by forcing commercial speakers to buy space in newspapers in order to have access to the public right of way. The ban "imposes a financial burden on [commercial speakers] because of the

content of their speech," and is presumptively unconstitutional. *Simon & Schuster*, 502 U.S. ___, 112 S. Ct. at 508.

B. The ban cannot be directed at "secondary effects" peculiar to newsracks containing commercial speech, for there is no evidence of "secondary effects" distinguishing such newsracks from other newsracks.

The City does not argue, as it cannot, that Discovery Center's and Harmon's newsracks differ from "non-commercial" newsracks in their effect upon the safety and aesthetics of the right of way. Therefore, the City's ban does not qualify as "content-neutral" on the theory that the "secondary effects" of newsracks containing commercial speech, and not the speech, are the targets of the City's ban. *Cf. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (upholding ordinance affecting "adult motion picture theatres," but not "other" motion picture theatres, as content-neutral because aimed at the particular secondary effects of "adult motion picture theaters" on neighboring community). In short, nothing about Discovery Center's and Harmon's newsracks or their speech justifies disparate treatment of their newsracks. The City's ban draws a distinction among newsracks based upon the nature of the publications they contain, even though that distinction is wholly irrelevant to the problems the City seeks to address. This content-based distinction cannot support a total ban on Discovery Center's and Harmon's newsracks. Finally, the City's ban cannot pass muster as a content-based regulation of speech, for it is not narrowly drawn to address the City's concerns about the lack of uniformity among newsracks. *See Burson*

v. Freeman, ___ U.S. ___, No. 90-1056 (May 26, 1992); *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

V. The City's Regulatory Scheme Is Unconstitutional On Its Face Because It Affords The City Unbridled Discretion To Permit Or Deny Speakers Access To The Public Right of Way Whether By Means Of A Newsrack Or Otherwise.

It is settled law that a licensing scheme that "vests unbridled discretion in a government official over whether to permit or deny expressive activity" violates the first amendment. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755 (1988); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *Lovell v. Griffin*, 303 U.S. 444 (1938). Such a scheme is a threat to expression because it is a classic prior restraint, *Lakewood*, 486 U.S. at 757, and because it "raises the specter of content and viewpoint censorship." *Id.* at 763. The City of Cincinnati's regulatory scheme governing the distribution of "commercial handbills" is just such a scheme.[2]

---

[2] Discovery Center and Harmon raised their facial challenge to the City's regulatory scheme in their complaint, J. A. 8, and in the memorandum in support of their motion for injunctive relief in the district court. Case No. C-1-90-437, Doc. #2. Neither the district court nor the court of appeals reached this issue. Discovery Center and Harmon are nevertheless entitled to renew their facial challenge as argument in support of the judgment of the court of appeals. *Washington v. Yakima Indian*

(Continued on following page)

A. The City's scheme places unbridled discretion in the hands of city officials to determine whether or not a publication is a "commercial handbill."

The City's scheme suffers from several layers of constitutional infirmity. First, the foundation of the City's scheme is Section 714-23 of the Cincinnati Municipal Code, which is itself constitutionally infirm under *Virginia Pharmacy Board* because it totally bans commercial speech on the public right of way. Section 714-23 provides, in pertinent part, that no person shall

> "hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful . . . for any person to hand out or distribute . . . any non-commercial handbill to any person willing to accept it [in any public place.]"

C.M.C. §714-23. Second, the City's scheme is devoid of the definitional clarity necessary to label any given publication a "commercial handbill" so as to deny it access to the public right of way, without "raising the specter" of content or viewpoint-based censorship. *Lakewood*, 486 U.S. at 763. Section 714-1-C of the Cincinnati Municipal Code defines "commercial handbill" as any written or printed matter

---

(Continued from previous page)

Nation, 439 U.S. 463, 476 n.20 (1979). This Court "may affirm [that judgment] on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (citation omitted). This Court has plenary power to address this argument, in view of the important first amendment rights at stake. *See Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 505, 510 (1984).

> (a) Which advertises for sale any merchandise, product, commodity or thing; or
>
> (b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or
>
> (c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

C.M.C. §714-1-C. On the other hand, the Cincinnati Municipal Code defines "non-commercial handbill" as any "printed or written matter . . . newspaper, magazine, paper, [or] booklet . . . not included in the aforementioned definitions of a commercial handbill." C.M.C. §714-1-N. Section 862-1 of the Cincinnati Municipal Code grants permission to "any person . . . lawfully authorized to engage in the business of selling newspapers to occupy space on the sidewalks of the City streets for selling newspapers . . . [with permission of adjacent building owners or tenants]." C.M.C. §862-1. Section 911-17 of the Cincinnati Municipal Code provides that "newspapers of general circulation in the City of Cincinnati" may be sold from newsracks, subject to administrative safety regulations. C.M.C. §911-17. Finally, Amended Regulation 38 sets forth the procedures for obtaining permits to distribute "newspapers of general circulation" through newsracks, but is silent as to the standards to be employed in determining which publications come within its ambit. Neither the Cincinnati Municipal Code nor Administrative Regulations 38 or 67 define the term "newspaper." J. A. 206, 362, 375.

This lack of clarity in the City's regulatory scheme empowers City officials to grant or deny access to the public right of way on the basis of whether a publication is deemed a "commercial handbill" or a "non-commercial handbill," without meaningful guidelines or standards by which the two defined categories of speech may be distinguished. Nor is the lack of clarity in the "commercial"/"non-commercial" handbill distinction remedied by reference to the form of publication identified as a "newspaper," within the City's lexicon. It cannot be disputed that any "newspaper," as that term is commonly understood, "advertises [merchandise] for sale," and "directs attention to . . . business[es] . . . or other activi[ties]," and is thus a "commercial handbill," within the meaning of Section 714-1-C. As a result, the City's overall scheme of regulating the dissemination of speech on the public right of way poses a substantial threat of content-based censorship, whether among publications commonly thought of as "newspapers," or among publications such as Discovery Center's and Harmon's, which contain truthful commercial information about fully protected activity, or among publications falling into either category. Unlike the licensing scheme invalidated in *Lakewood*, which regulated solely the issuance of permits for users of newsracks, the City of Cincinnati's regulation of newsracks is intimately tied to its overall scheme governing the dissemination of all speech on the public right of way in any manner. The City's scheme, therefore, poses a greater threat to speech than the licensing provision held unconstitutional in *Lakewood*. 486 U.S. at 778 (White, J., dissenting). Furthermore, because the City's scheme requires the yearly renewal of newsrack licenses, J. A. at 123, it poses an added risk of censorship even upon currently licensed

speakers. *Lakewood*, 486 U.S. at 760. In the absence of criteria to direct decision-making with regard to the renewal of newsrack permits, speakers holding newsrack permits may feel constrained to tailor their speech in order to anticipate the criteria the City might apply, in order to maintain their permits.

The potential for content- or viewpoint-based censorship inherent in the City's scheme is not merely speculative. Indeed, the record in this case establishes that in developing and implementing its regulation governing newsracks the City consciously enjoys a "partnership," J. A. at 61, 191, with the City's leading daily newspapers – all arguably "commercial handbills" under Section 714-1-C – that places the City's imprimatur upon those publications (but not Discovery Center's and Harmon's) and grants them access to the public right of way, subject to newsrack design and placement guidelines equally applicable to all newsracks, regardless of the commercial content of their publications. Moreover, Discovery Center and Harmon compete with local newspapers for advertisers. In effect, the City's scheme confers an obvious and constitutionally dubious advantage upon newspapers in that competition. The content-based censorship inherent in the City's active involvement with newspapers to regulate newsracks is palpable, and underscores the unconstitutionality of the City's regulatory scheme. *Cf. Lakewood*, 486 U.S. 790 (White, J., dissenting) ("[T]here could be no allegation in this case that the Mayor's discretion to deny permits *actually* has been abused to the detriment of the newspaper . . . . ") (emphasis in original); *Taxpayers for Vincent*, 466 U.S. at 804 ("[T]here is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance").

B. The City's interpretation of the term "commercial handbill" does not cure the facial infirmity of its regulatory scheme.

This Court has stated that the facial infirmity of a regulatory scheme such as the one at issue in this case may be cured where the government has adopted a narrowing construction which provides guidance to decisionmakers charged with enforcing the scheme. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (collecting cases). In the instant case, however, the fatal lack of clarity in the language of the City's regulations governing the dissemination of speech on the public right of way is not remedied by the City's *ad hoc* interpretation of the term "commercial handbill." On February 7, 1990, the Cincinnati City Manager notified members of the City Council that as of that date he would instruct the City Public Works Department to "limit approvals under Administrative Regulation 38 to daily or weekly publications primarily presenting coverage of, and commentary on, current events." Pl.Ex 2; J. A. 229-30. That day the City Council passed a motion requiring the enforcement of Sections 714-23 and 714-1-C to bar from the public right of way newsracks from which "commercial handbills" were distributed. Pl.Ex. 8; J. A. 236; Pl.Ex. 9; J. A. 238. As a result, Discovery Center's and Harmon's newsrack permits were revoked pursuant to the City Manager's determination that their publications were "commercial handbills" because they did not "*primarily*" cover current events. J. A. 100-103; Pl.Ex. 8; J. A. 236; Pl.Ex. 9; J. A. 238. However, the definition of "commercial handbill" put into operation by the City Manager has not been enacted into law. J. A. at 112, 122. Therefore, there is

no notice to potential permit seekers of the City Manager's interpretation of "commercial handbill." One result of this combination of lack of clarity and lack of public notice is the likelihood that speakers who would qualify as "non-commercial handbills" because they are devoted "primarily" to editorial comment on current events would be inhibited from seeking newsrack permits, or from otherwise distributing their publications on the public right of way, because they meet the facially disqualifying criteria of Section 714-1-C.

Despite the imprecision of the criterion that a publication "primarily" cover current events in order to be considered a "non-commercial handbill," the City Engineer testified that the City has not adopted a measure of the amount of coverage or commentary on current events that would save a publication from the City's ban on "commercial handbills" on the public right of way. J. A. 111. The City Engineer was unable to state precisely which publications he would consider to be "non-commercial handbills." The City Engineer stated that he "recognize[d] that there is . . . commercial material in any of the publications that we all recognize as newspapers." *Id.* at 110. He further testified that he had "concern about publications that [were] *almost entirely or entirely commercial in nature.*" *Id.* (emphasis added). The determination whether a publication containing sixty percent advertising content was a "commercial handbill" would be made on a case-by-case basis. *Id.* at 112. A publication containing "fifty percent news versus commercial material" might be a "borderline" case. *Id.* at 111.

The City Engineer's testimony demonstrates that the City has not interpreted the term "commercial handbill" so as to cure the facial infirmities of its regulatory

scheme. City officials retain unbridled discretion to determine which publications pass muster as "non-commercial handbills," and, thus, to determine which publications may be distributed on the public right of way. Therefore, the City's scheme is not saved by any narrowing construction attributable to the decisionmaker responsible for granting or denying speakers access to the public right of way, and it must be declared unconstitutional on its face. *See Ward*, 491 U.S. at 795.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

MARC D. MEZIBOV
Counsel of Record

MARTHA K. LANDESBERG
SIRKIN, PINALES, MEZIBOV & SCHWARTZ
920 Fourth & Race Tower
105 W. Fourth Street
Cincinnati, Ohio 45202
(513) 721-4876

Attorneys for Respondents